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IN THE
COURT OF APPEALS OF INDIANA

DAMON GRAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-655
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-9910-CF-175452

April 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Damon Gray appeals the fifteen-year sentence he received, following a guilty plea, for class B felony dealing in cocaine. We affirm.

Issue

We consolidate and restate Gray's issues as follows: whether Gray is entitled to revision of his sentence.

Facts and Procedural History

At his guilty plea hearing, Gray stipulated to the following factual basis:

> [O]n October 7th of the year 1999 at approximately 12:50 in the afternoon, Officer Gary Riggs along with several other members of the Indianapolis Police Department, were conducting surveillance, neighborhood resource operations, in the vicinity of Balsam Avenue and Fall Creek Parkway. They saw [Gray] and saw some, what they believed, to be suspicious activity. Officer Steve Walters approached. As the officer approached, [Gray] started to run. The case ended at […] Fall Creek itself where Officer Gary Riggs saw [Gray] throw down a white piece of paper that was later determined to be a cocaine substance inside and the officer also saw [Gray] holding a gun. [Gray], during his flight, had thrown down a set of digital scales common to drug sales. The substance that was believed to be cocaine was tested by the Crime Lab and proved to be […] crack-cocaine in the amount of 27.6 grams which is consistent with sale use, not personal use. All this occurred in Marion County. In addition, [Gray] did not have a license for the handgun and he had two prior unrelated felony convictions. On September 25th, 1996, [Gray] committed the crime of Carrying a Handgun Without a License, a Class C felony. He was convicted of that offense on October 22nd, 1997. On December 1st of 1998, [Gray] committed the offense of Possession of Cocaine, a Class D felony. He was convicted of that offense on March 25th, 1999.

Tr. 19-21 (parentheticals omitted).

On October 8, 1999, the State charged Gray with class A felony dealing in cocaine,[1] class C felony possession of cocaine, class C felony possession of cocaine and a firearm, class C felony carrying a handgun without a license,[2] and two counts of class A misdemeanor resisting law enforcement. On December 15, 1999, the State charged Gray with being a habitual offender based on the two prior unrelated felony convictions mentioned above.[3]

On September 18, 2000, Gray signed a plea agreement in which he agreed to plead guilty to class B felony dealing in cocaine, class C felony possession of cocaine and a firearm, class A misdemeanor carrying a handgun without a license, and to being a habitual offender. Gray agreed to a sentence of ten to fifteen years on the class B felony charge, to be served concurrent with a four-year sentence on the class C felony charge and a one-year sentence on the class A misdemeanor charge. Gray also agreed to a ten-year habitual offender enhancement on the class B felony count, for an aggregate sentence of twenty to twenty-five years. In exchange, the State agreed to dismiss the remaining charges. At a

[1] *See* Ind. Code § 35-48-4-1(a) (stating that a person who possesses cocaine with intent to deliver commits class B felony dealing in cocaine); Ind. Code § 35-48-4-1(b) (stating that the offense is a class A felony if "the amount of the drug involved weighs three (3) grams or more").

[2] *See* Ind. Code § 35-47-2-1(a) ("a person shall not carry a handgun in any vehicle or on or about the person's body, except in the person's dwelling, on the person's property or fixed place of business, without a license issued under this chapter being in the person's possession."); Ind. Code § 35-47-2-23(c) ("A person who violates [Ind. Code § 35-47-2-1] commits a Class A misdemeanor. However, the offense is a Class C felony: … (2) if the person: … (B) has been convicted of a felony within fifteen (15) years before the date of the offense.").

[3] *See* Ind. Code § 35-50-2-8(g) ("A person is a habitual offender is the [factfinder] finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions."); Ind. Code § 35-50-2-8(h) (pre-2005) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.").

hearing on that date, the trial court accepted Gray's guilty plea and set the matter for sentencing.

At the sentencing hearing on November 1, 2000, the trial court asked Gray if he had had an opportunity to review the presentence investigation report ("PSI") and if he had any factual corrections to make. Gray stated that he had reviewed the PSI and offered several corrections unrelated to the criminal history detailed therein. At the conclusion of the hearing, the trial court stated,

> We'll show that the presentence report will be accepted as it has been corrected. I find that there are aggravating circumstances in that [Gray] has a history of criminal delinquent activity. He has three juvenile arrests, one true finding [as to each of three counts: class A misdemeanor battery, class B misdemeanor disorderly conduct, and class A misdemeanor resisting law enforcement. PSI at 3]. He has 12 adult arrests, four convictions, two of which were felonies. I find it aggravating that he was on probation at the time of this offense. I find it aggravating that he's had alternative placements in the past and they have failed to deter his activities. I'll show that - - I'll find mitigating factors in that [Gray] has admitted responsibility for his actions and that he has - - that imprisonment of [Gray] will result in an undue hardship to dependants of [Gray[4]].
> ….
> …. You're going to have to do a lot of time here. Okay. But it's not near as much time as it could possibly have been had you been found guilty. I think you have to look at that also in that yes, we're arguing between a ten and a 15-year range [for the class B felony cocaine count] on a possible really from 20 to 25 years [with the ten-year habitual offender enhancement] which is a lot of time. I - - and I don't downplay that. But it is better than the possibility that it could have gone up to 50 years,[5] which, with your history, would have been - - could have been very likely. So I want you to understand that. But I do

[4] Gray's mother testified that she had diabetes and arthritis and that Gray assisted her with household duties and with caring for his eleven-year-old niece. Tr. at 37-38.

[5] We presume that the trial court is referring here to the maximum sentence that Gray could have received for a class B felony with a habitual offender enhancement, as opposed to the maximum sentence for the class A felony with which he was originally charged. *See* Ind. Code § 35-50-2-5 (sentencing range for class B felony); Ind. Code § 35-50-2-8(h) (sentencing range for habitual offender enhancement); Ind. Code § 35-50-2-4 (sentencing range for class A felony).

> believe that there is - - that it is important that you understand that because I don't want you to be discouraged. I'm going to have to - - because of the aggravating circumstances, I'm going to have to sentence you to the 15 years on the range that you had there because of that but I don't want you to be discouraged by that.

Tr. at 47-49.

Our review of the PSI indicates that Gray has three prior misdemeanor convictions: (1) class A misdemeanor carrying a handgun without a license in January 1996; (2) class A misdemeanor criminal trespass in March 1999; and (3) class C misdemeanor operating a motor vehicle having never received a license in August 1999. PSI at 4-5. The PSI indicates that Gray has five prior felony convictions: (1) class D felony auto theft in October 1997; (2) class D felony resisting law enforcement in October 1997; (3) class D felony cocaine possession in October 1997; (4) class D felony carrying a handgun without a license in October1997; and (5) class D felony cocaine possession in March 1999. *Id*.[6] Following his October 1997 convictions, Gray was placed on probation. In June 1999, he was found to have violated his probation by committing the crimes for which he was convicted in March 1999 (and for which he was still on probation at the time of the instant offenses). On October 7, 1999, a notice of probation violation was filed alleging failure to report, failure to comply with substance abuse counseling, and being arrested for disorderly conduct and public intoxication. On October 21, 1999, the notice was amended to add Gray's arrest for the instant offenses. *Id*. at 4.

[6] The brief summary of Gray's legal history on page 6 of the PSI is not entirely consistent with the much more detailed account of Gray's juvenile and criminal record on pages 3 through 6.

On March 5, 2001, Gray filed a pro se petition for post-conviction relief pursuant to Indiana Post-Conviction Rule 1, in which he challenged the basis for his stop and seizure and claimed that his convictions violated federal double jeopardy principles. On February 8, 2005, Gray, by counsel, filed a motion to withdraw the petition. On May 12, 2006, Gray, by counsel, filed a petition for permission to file a belated direct appeal pursuant to Post-Conviction Rule 2, which the trial court granted four days later.

Discussion and Decision

At the time Gray was convicted and sentenced, Indiana Code Section 35-50-2-6 provided, "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Pursuant to his guilty plea, Gray agreed to give the trial court discretion to impose a sentence between ten and fifteen years on the class B felony cocaine dealing count. The sentences on the remaining counts, including the ten-year habitual offender enhancement, were not subject to the trial court's discretion.

Gray raises several challenges to the fifteen-year sentence he received on the class B felony count. First, he claims that the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), applies retroactively to his belated appeal and that the trial court violated his Sixth Amendment rights by enhancing his sentence above the ten-year presumptive term based on details of his criminal history other than his prior convictions. *Cf. Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005) ("Under *Blakely*, a trial court in a determinate sentencing system such as Indiana's may enhance a sentence based only on those

facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding."). Assuming, without specifically deciding, that Gray is entitled to *Blakely*'s retroactive application, we conclude that he is not entitled to appellate relief.[7]

In his initial brief, Gray contends that juvenile adjudications are not prior convictions for *Blakely* purposes. Appellant's Br. at 10 (citing *Pinkston v. State*, 836 N.E.2d 453, 463 (Ind. Ct. App. 2005), *trans. denied* (2006)). The State points out that our supreme court held otherwise in *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005), *cert. denied* (2006).[8] Appellee's Br. at 8 (citing *Ryle*, 842 N.E.2d at 321-23). The State also notes *Ryle*'s holding that "the fact that a defendant was on probation at the time of the offense may also be used to enhance a sentence without running afoul of *Blakely*." Appellee's Br. at 8 (citing *Ryle*, 842 N.E.2d at 323-25).

Gray further contends that the trial court ran afoul of *Blakely* in finding his failure to be deterred by alternative placements as a separate aggravating circumstance. In *Morgan v. State*, 829 N.E.2d 12 (Ind. 2005), our supreme court held that such statements "are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under *Blakely*" but "cannot serve as separate aggravating circumstances." *Id*. at 17. Gray also

[7] The author of this opinion also wrote *Gutermuth v. State*, 848 N.E.2d 716 (Ind. Ct. App. 2006), *trans. granted*, in which the majority held that *Blakely* applies retroactively to belated appeals. Our supreme court granted transfer in *Gutermuth* and has scheduled oral argument for March 22, 2007. Gutermuth has filed a motion to dismiss, which is currently pending before the court.

asserts that the trial court erred in considering his arrests not resulting in convictions as an aggravating circumstance. Appellant's Br. at 9 (quoting *Williams v. State*, 830 N.E.2d 107, 113 n.4 (Ind. Ct. App. 2005) ("[P]rior arrests are an improper aggravator because they are not prior convictions which have been found by a jury or admitted to by the defendant."), *trans. denied*).

The State contends that any *Blakely* errors are "purely harmless" in light of Gray's numerous juvenile true findings and criminal convictions and the fact that Gray committed the instant offenses while on probation. Appellee's Br. at 8. We agree. As stated previously, Gray has true findings as to three juvenile offenses, three misdemeanor convictions (including one for carrying a handgun without a license), and five felony convictions (including two for cocaine possession and one for carrying a handgun without a license). Given the number of prior convictions, as well as the fact that Gray committed the instant offenses while on probation, we find no basis for relief on *Blakely* grounds.

Gray also claims that the trial court "improperly utilized the same convictions to both enhance the presumptive sentence and to support a habitual offender enhancement for the same count." Appellant's Br. at 12 (capitalization altered). We disagree. In *Waldon v. State*, 829 N.E.2d 168 (Ind. Ct. App. 2005), *trans. denied*, upon which Gray relies, another panel of this Court stated that "[t]he felonies which supported the habitual offender finding could not *standing alone* be relied upon as the aggravating factor of a prior criminal record to enhance the sentence." *Id*. at 182 (emphasis added). Here, in addition to the two prior unrelated felony convictions which supported his habitual offender finding, Gray has three felony

[8] In his reply brief, Gray apologizes for this oversight.

convictions, three misdemeanor convictions, and true findings as to three juvenile offenses. In other words, Gray has more than enough prior convictions to spare. As such, we find no error here.

Next, Gray asserts that when the improper aggravators considered by the trial court are excluded, the remaining aggravators do not outweigh the mitigating circumstances of his acceptance of responsibility and the hardship on his dependants. Gray cites no authority to support this assertion, let alone to indicate how much weight the trial court should have given the mitigating factors. He has therefore waived this issue. *Jackson v. State*, 735 N.E.2d 1146, 1154 (Ind. 2000) (finding that defendant waived sentencing challenge where he cited no supporting authority or explained "why or how the trial court abused its discretion" in sentencing him).[9]

Finally, Gray contends that he is entitled to relief pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[10] Once again, Gray's contention is unsupported by citation to authority. We believe that Gray's fifteen-year sentence for class B felony dealing in cocaine is entirely appropriate in view of his

[9] Our supreme court has stated that a guilty plea "is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). Here, Gray greatly reduced his potential exposure by pleading guilty to fewer charges, the most serious of which was reduced from a class A felony to a class B felony notwithstanding Gray's possession of over twenty-seven grams of crack cocaine and a set of digital scales.

[10] In his brief, Gray also refers to the "manifestly unreasonable" standard that was in effect pursuant to former Appellate Rule 17(B) when he was sentenced in November 2000. Because Appellate Rule 7(B) is directed to the reviewing court, we use the current "inappropriateness" standard to review Gray's sentence. *Polk v. State*, 783 N.E.2d 1253, 1260 (Ind. Ct. App. 2003).

possession of twenty-seven grams of crack cocaine, an unlicensed handgun, and a set of digital scales, as well as his penchant for dealing in cocaine, carrying unlicensed handguns, violating probation, and engaging in other illegal activity that reflects extremely poorly on his character. Accordingly, we affirm.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.